TAY SWEE TECK v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
LIM YEE LAN JCA
AHMADI ASNAWI JCA
[CRIMINAL APPEAL NO: B-07-45-09-2016]
17 JANUARY 2018

CRIMINAL PROCEDURE: *Appeal – Procedures for, principles governing – Notice of motion for leave to appeal – Application for – Whether questions of law arose – Whether applicant's arguments mixture of facts or merits of case and law – Whether in accordance with s. 50(2) of Courts of Judicature Act 1964*

CRIMINAL PROCEDURE: *Customs investigation – Seizure of vehicle – Notice of motion for leave to appeal – Application for – Whether questions of law arose – Whether mandatory requirement for application to Magistrate of First Class to be made within one calendar month from date of seizure – Whether specific time frame given to customs officer to make reference to Magistrate for inquiry – Whether applicant's arguments mixture of facts or merits of case and law – Whether in accordance with s. 50(2) of Courts of Judicature Act 1964*

CUSTOMS AND EXCISE: *Seizure – Seizure of vehicle – Notice of motion for leave to appeal – Application for – Whether questions of law arose – Whether mandatory requirement for application to Magistrate of First Class to be made within one calendar month from date of seizure – Whether specific time frame given to customs officer to make reference to Magistrate for inquiry – Whether applicant's arguments mixture of facts or merits of case and law – Whether in accordance with s. 50(2) of Courts of Judicature Act 1964*

A team of raiding officers from the Customs Department examined a Toyota Camry motorcar and found 125 cartons of various brands and types of cigarettes, believed to be uncustomed or prohibited goods. After further investigation, a notice of seizure was sent to the owner of the motorcar under s. 114 of the Customs Act 1967 ('Customs Act') for an offence under s. 135(1)(d) of the same. The appellant then submitted a notice within one calendar month from the date of seizure to claim that he was the owner of the said car as required under s. 128(2) of the Customs Act. The appellant further claimed that the motorcar ought not to be forfeited as he was not involved in the commission of the offence under s. 135(1)(d) of the Customs Act. The Director General of Customs then directed that the appellant's claim be referred to the Magistrate for an inquiry. The Magistrate found that there was no case under s. 135(1)(d) and 135(1)(e) of the Customs Act against the appellant and as such the prosecution could not apply for a forfeiture of the said car under s. 128(3) of the same Act. Hence, the Magistrate dismissed the prosecution's application and ordered the said car to be released and returned to the appellant. Upon appeal, the High Court reversed the decision

of the Magistrate and further made an order to forfeit the said car to the Government of Malaysia. Aggrieved, the appellant filed this notice of motion for leave to appeal to the Court of Appeal pursuant to s. 50(2) of the Courts of Judicature Act 1964 ('CJA'). The prosecution objected to this application on the ground that there was no question of law raised by the appellant to entitle the appeal to be heard on merit. The main issue for this court to decide was whether this application had complied with the strict requirement under s. 50(2) of the CJA.

Held (dismissing application)
Per Mohtarudin Baki JCA delivering the judgment of the court:

(1) Upon seizure of the goods on suspicion by the Customs Department under s. 114 of the Customs Act, a claim must be made within one calendar month pursuant to s. 128. If there is no claim within one calendar month, the goods are deemed to be forfeited. In the event of a claim for the goods being made but where there is no prosecution over the same, the Senior Officer of Customs shall refer the claim to the Director General who may then direct them to be released or the matter be referred to a Magistrate of the First Class to carry out an investigation or a hearing as to whether the goods ought to be forfeited or returned to the owner. Thus, there was no mandatory requirement for an application to the Magistrate of the First Class to be made within one calendar month from the date of seizure. There was no specific time frame given to the Senior Customs Officer to make reference to the Director-General for further directions or to make an application before the Magistrate for an inquiry. (para 12)

(2) In order to obtain 'leave' and subsequently file the notice of appeal, the appellant had to satisfy the court that there were questions of law as specified in sub-s. (2) of s. 50 of the CJA for the determination by the court. In the present case, the appellant's arguments were a mixture of facts or merits of the case and law. This was obviously not in accordance with s. 50(2) of the CJA. (para 13)

Bahasa Malaysia *Headnotes*

Satu pasukan pegawai serbuan dari Jabatan Kastam memeriksa sebuah kereta Toyota Camry dan menemui 125 karton pelbagai jenama dan jenis rokok, dipercayai barangan yang tidak dikastamkan atau dilarang. Selepas siasatan lanjut, notis penyitaan dihantar kepada pemilik kereta bawah s. 114 Akta Kastam 1967 ('Akta Kastam') atas kesalahan bawah s. 135(1)(d) Akta yang sama. Perayu kemudiannya menyerahkan satu notis dalam tempoh satu bulan kalendar dari tarikh penyitaan untuk menuntut bahawa dia adalah pemilik kereta tersebut seperti yang dikehendaki bawah s. 128(2) Akta Kastam. Perayu selanjutnya mendakwa bahawa kereta tersebut tidak

sepatutnya disita kerana dia tidak terlibat dalam pelakuan kesalahan bawah s. 135(1)(d) Akta Kastam. Ketua Pengarah Kastam kemudiannya mengarahkan tuntutan perayu dirujuk kepada Majistret untuk inkuiri. Mahkamah Majistret mendapati bahawa tiada kes bawah s. 135(1)(d) dan 135(1)(e) Akta Kastam terhadap perayu dan dengan itu pihak pendakwaan tidak boleh memohon untuk penyitaan kereta tersebut bawah s. 128(3) Akta yang sama. Oleh itu, Majistret menolak permohonan pendakwaan dan memerintahkan kereta tersebut dilepaskan dan dikembalikan kepada perayu. Atas rayuan, Mahkamah Tinggi membatalkan keputusan Majistret dan membuat perintah untuk menyita kereta tersebut kepada Kerajaan Malaysia. Terkilan, perayu memfailkan notis usul untuk kebenaran merayu ke Mahkamah Rayuan bawah s. 50(2) Akta Mahkamah Kehakiman 1964 ('AMK'). Pihak pendakwaan membantah permohonan ini atas alasan tiada persoalan undang-undang yang dibangkitkan oleh perayu untuk rayuan didengar atas merit. Isu utama untuk penentuan mahkamah ini adalah sama ada permohonan ini mematuhi keperluan bawah s. 50(2) AMK.

Diputuskan (menolak permohonan)
Oleh Mohtarudin Baki HMR menyampaikan penghakiman mahkamah:

(1) Dengan penyitaan barangan kerana disyaki oleh Pejabat Kastam bawah s. 114 Akta Kastam, satu tuntutan harus dibuat dalam tempoh satu bulan kalendar menurut s. 128. Jika tiada tuntutuan dibuat dalam tempoh satu bulan kalendar, barangan adalah dianggap disita. Jika terdapat tuntutan barangan dibuat tetapi tiada pendakwaan atasnya, Pegawai Kanan Kastam harus merujuk tuntutan kepada Ketua Pengarah yang kemudiannya akan mengarahkan barangan itu dilepaskan atau hal perkara dirujuk kepada Majistret Kelas Pertama bagi menjalankan siasatan atau perbicaraan sama ada barangan harus disita atau dikembalikan kepada pemilik. Oleh itu, tiada keperluan mandatori untuk permohonan kepada Majistret Kelas Pertama untuk dibuat dalam tempoh satu bulan kalendar dari tarikh penyitaan. Tiada tempoh waktu tertentu diberi kepada Pegawai Kanan Kastam untuk membuat rujukan pada Ketua Pengarah untuk arahan selanjutnya atau untuk membuat permohonan di hadapan Majistret untuk inkuiri.

(2) Untuk memperoleh 'kebenaran' dan seterusnya memfailkan notis rayuan, perayu harus menunjukkan pada mahkamah bahawa terdapat persoalan undang-undang seperti yang ditetapkan dalam sub-s. (2) s. 50 AMK untuk penentuan mahkamah. Dalam kes ini, hujahan-hujahan perayu adalah campuran fakta dan merit kes dan undang-undang. Ini dengan jelasnya tidak mematuhi s. 50(2) AMK.

A **Case(s) referred to:**
PP v. Pasupathy Kanagasaby [2001] 2 CLJ 753 CA ***(refd)***
Suntharaju Pachayappan v. Jabatan Kastam Diraja Malaysia [2010] 3 CLJ 865 HC ***(refd)***

Legislation referred to:
B Courts of Judicature Act 1964, s. 50(2)
Customs Act 1967, ss. 114, 128(2), (3), (4), 135(1)(d), (e)

For the appellant - Ayasamy Velu & Renuka Krishnasamy; M/s V Samy & Co
For the respondent - Farah Ezlin Yusop Khan & Goh Hsiao Tung; DPPs

[Editor's note: Appeal from High Court, Shah Alam; Criminal Appeal No: 41(ORS)-4-11-
C *2015 (affirmed).]*

Reported by Suhainah Wahiduddin

JUDGMENT

D **Mohtarudin Baki JCA:**

Introduction

[1] This is an application for leave pursuant to s. 50(2) of the Courts of Judicature Act 1964 (Act 91) by the appellant. It arose from the seizure of the appellant's car, a Toyota Camry bearing the registration number TAY
E 9260 and chassis number MR053BK4107061153, on 2 April 2013 under s. 128(3) of the Customs Act 1967. On 31 July 2015, after hearing the parties, the learned Magistrate had ordered the car to be returned to the appellant. Dissatisfied with the decision, the prosecution filed an appeal to the High Court. The learned High Court Judge had set aside the decision of the
F Magistrate and ordered the said car to be forfeited to the Government.

[2] Aggrieved by the decision of the High Court, the appellant filed a notice of motion for leave to appeal to the Court of Appeal. We heard the motion and had unanimously dismissed the same for the following reasons.

G **Brief Facts Of The Case**

[3] On 2 April 2013, a team of raiding officers from Customs Department went to Simpang 3, Jalan Bukit Changgang, Kawasan 10, 42000 Pelabuhan Klang. Mohd Razaki bin Mohamad Zin, raiding chief (SP2), saw a Toyota Camry motorcar bearing registration number TAY 9260 parked by the
H roadside. SP2 observed the car for about one and half hours and nobody approached the said car. SP2 found the car was not locked and there was a black coloured package at the back passenger seat. The car key was seen hanging at the ignition starter. Upon examination of the car boot, SP2 found 125 cartons of various brands and types of cigarettes, believed to be
I uncustomed or prohibited goods. SP2 posted a notice of seizure of the said vehicle and the goods therein pursuant to s. 114 of the Customs Act on a pole near the car.

[4] Azis bin Mohd Rais (SP3), the investigating officer, stated that the value of the cigarettes was RM1,602 with unpaid customs duty amounting to RM9,944.64 at the time of seizure. After further investigation, a notice of seizure was sent to the owner of the motorcar under s. 114 of the Customs Act for an offence under s. 135(1)(d) of the Customs Act.

[5] The appellant then submitted a notice within one calendar month from the date of the seizure to claim that he is the owner of the said car as required under s. 128(2) of the Customs Act. The appellant further claimed that the motorcar ought not to be forfeited as he was not involved in the commission of the offence under s. 135(1)(d) of the Customs Act. Upon completing the investigation, SP3 then referred the investigation papers to the prosecution division and a decision was made that there will be no prosecution under s. 135(1)(d) of the same as there was insufficient evidence. The Director-General of Customs then directed that the appellant's claim be referred to the Magistrate for an inquiry.

Decision Of The Magistrate

[6] An inquiry was held before the Magistrate in accordance to s. 128(4) of the Customs Act. The main issue was whether the prosecution had failed to refer the claim made by the appellant to the Magistrate within one calendar month as required under s. 128(3) of the Customs Act. The appellant claimed that the delay of one year and seven months in referring the appellant's claim to the Magistrate by the prosecution had violated s. 128 of the Customs Act and the principles laid down in *Suntharaju Pachayappan v. Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865. The Magistrate also found that there was no case under s. 135(1)(d) and 135(1)(e) of the Customs Act against the appellant and as such the prosecution could not apply for a forfeiture of the said car under s. 128(3) of the same Act. Hence, the Magistrate dismissed the prosecution's application and ordered the said car to be released and returned to the owner, the appellant.

Decision By High Court

[7] Upon appeal, the learned High Court Judge reversed the decision of the learned Magistrate and further made an order to forfeit the said car to the Government of Malaysia. His Lordship had disagreed with the learned Magistrate and opined that there is no burden imposed upon the prosecution to refer the appellant's claim to the Magistrate's Court within one calendar month from the date of seizure of the said vehicle.

The Application Before Us

[8] Aggrieved by the decision of the High Court, the appellant filed this notice of motion, supported by his own affidavit for leave to appeal to the Court of Appeal. The prosecution had, through their affidavit in reply, objected to this application on the ground that there is no question of law

raised by the appellant to entitle the appeal to be heard on merit. It must be noted that this application was made pursuant to s. 50(2) of the Courts of Judicature Act 1964 and the main issue for this court to decide is whether this application had complied with the strict requirement under the said section. The relevant provision is stipulated as below:

> **50. Jurisdiction to hear and determine criminal appeals**
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> (2) *An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only question of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.*
>
> (2A) *An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.*
>
> (3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorised by the Public Prosecutor; and notwithstanding subsection (2) no leave of the Court of Appeal is required.
>
> (4) Except as otherwise provided in this section, an appeal may lie on a question of fact or a question of law or on a question of mixed fact and law. (emphasis added)

Our Findings

[9] Upon hearing both the parties and perusing their respective affidavits, we are of the view that the thrust of the appellant's contention was not confined solely on the question of law but rather a mixture of question of law and fact. In the case of *PP v. Pasupathy Kanagasaby* [2001] 2 CLJ 753, Justice Lamin Mohd Yunus, President of the Court of Appeal (as he then was) stated that:

> ... Encik Shahul's main complaint was that there was not a single question of law formulated by the prosecution when filing the petition of appeal as envisaged by subsection (2) of s. 50 of the CJA 1964 and the appeal must therefore be dismissed. For ease of reference we reproduce below sub-ss. (2) & (3) of the CJA 1964:

(2) *An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.*

(3) Notice of any appeal by the Public Prosecutor shall be given by, or with the consent in writing of, that officer only; and notwithstanding subsection (2) no leave of the Court of Appeal is required.

In support of his contention that the question of law must be formulated he referred to the judgment of this court in the case of *Saad Abas & Anor v. PP* [1998] 2 MLRA 93; [1999] 1 MLJ 129; [1998] 4 CLJ 575; [1999] 1 AMR 384 where we said (at p. 587):

Now one final and vital point to be shown in an application made under s. 50(2) is one without which the application may be dismissed. It is this. The affidavit in support must formulate the "question of law" which have arisen in the course of the appeal "and the determination of which by the High Court has affected the event of the appeal." Not one such "question of law" was formulated. If we had so minded we could have summarily dismissed the application on this ground." (emphasis added)

[10] In the present case, the appellant posed a question whether the application under s. 128(3) of the Customs Act must be made within one calendar month from the date of the notice of seizure. This question, to us, arises from the decision of the learned High Court Judge who held that there is no mandatory requirement under the said provision for the matter to be referred to the Magistrate within one calendar month from the date of seizure of the goods. The appellant claimed that the prosecution had violated s. 128(3) of the Customs Act as the application by the prosecution was made only after approximately one year and seven months from the date of the seizure.

[11] We are mindful that it is unnecessary for us to dwell into the merits of the case at this juncture but nonetheless, we opined that the law is well settled with regards to s. 128 of the Customs Act. The said provision states:

(1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(c) shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:

(a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or

(c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be, be released, or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

[12] In totality, from the words employed in this section, it stipulates that upon seizure of the goods on suspicion by the Customs Department under s. 114 of the Customs Act 1967, a claim must be made within one calendar month pursuant to s. 128. If there is no claim within one calendar month, the goods are deemed to be forfeited. In the event of a claim for the goods being made but where there is no prosecution over the same, the Senior Officer of Customs shall refer the claim to the Director-General who may then direct them to be released or the matter be referred to a Magistrate of the First Class to carry out an investigation or a hearing as to whether the goods ought to be forfeited or returned to the owner. Thus, there is no mandatory requirement for an application to the Magistrate of the First Class to be made within one calendar month from the date of seizure. There is no specific time frame given to the Senior Customs Officer to make reference to the Director- General for further directions or to make an application before the Magistrate for an inquiry. As an illustration, if the owner of the goods became aware of the seizure only on the final day of the one calendar

month and the claim was made over the goods on the final day, how then could the Senior Custom Officer possibly file an application on the same final day taking into account that he still have to refer the claim to the Director General? Therefore, it is not practical to suggest that an application must be made to a Magistrate within one month from the date of seizure of the goods. This case can be very well be distinguished from the case of *Suntharaju (supra)* where the judge in that case had applied his mind to the facts and circumstances of the case. It involved a matter of urgency where the goods seized were not only a motor lorry, but also nine buffalos and the main concern was whether the matter had been first referred to the controller ie, the Director General of Customs prior to referring the same to the Magistrate for his decision to release the seized goods on an immediate basis.

[13] In order to obtain "leave" and subsequently file the notice of appeal, the appellant has to satisfy the court that there are questions of law as specified in sub-s. (2) of s. 50 of the Courts of Judicature Act for the determination by the court. In the present case, the appellant's arguments were a mixture of facts or merits of the case and law. This is obviously not in accordance with s. 50(2) of the Courts of Judicature Act 1964.

Conclusion

[14] For the reasons stated above, we unanimously dismiss the application for leave as there are no merits in the appeal. The law on s. 128(3) of the Customs Act 1967 is settled. Therefore, the leave for appeal is not allowed.